DATE: FEBRUARY 04, 1996

CASE NO: 94-INA-501

In the Matter of

ROUSSEAU ENTERPRISSE, INC.,

Employer

on behalf of

ANDY de JESUS ABREU,

Alien

Before: Jarvis, Vittone and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from Rousseau Enterprisse, Inc.'s' ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R., Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under

prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("A.F."), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On September 23, 1993, the Employer, Rousseau Enterprisse, Inc., filed a Form ETA 750, Application for Alien Labor Certification, with the Florida Department of Labor and Employment Security on behalf of the Alien, Andy de Jesus Abreu. AF 24-24(a). The job opportunity was listed as "Market Research Analyst," and the application set forth the following "special" requirement: "English/Spanish required."

The CO, in a Notice of Findings ("N.O.F.") dated October 7, 1993, proposed to deny the application on the ground that the Spanish language requirement was unduly restrictive, and therefore required the Employer to prove business necessity. AF 12. The CO advised that the Employer could make this showing by indicating, *inter alia,* the nature of its business, what percentage of its clients speak Spanish, and how it had conducted business in two languages in the past. In addition, under the heading "Corrective Action Required," the CO also indicated that the Employer provide the following:

> (1) Documentation of the foreign language requirement. The employer must submit correspondence, invoices, price lists, letters from clients, etc., which refer specifically to the employer and clearly show the necessity for the language requirement. Documentation submitted should cover the six months [sic] period preceding the date of the Notice of Findings. Any documents written in a foreign language must be accompanied by a certified translation.

The CO also questioned the fact that the Alien indicated on the 750-B form that he was presently employed at CIES in the Dominican Republic, yet listed a Gainesville, Florida address. AF 13.

The Employer, after being granted an extension, submitted its rebuttal on November 24, 1993. AF 5. Substantively, the rebuttal consisted of two letters. The first, a letter from Employer dated November 22, 1993, explained that the CO had "a misunderstanding as to the job and the nature of the duties." AF 7. The letter further explained that:

> [t]he position being offered - Market Research Analyst- is specifically for a person to conduct research on market conditions in the South Florida **Spanish speaking market** in order for us to determine whether it is feasible or not to **expand** our business operations to that segment of the population.

AF 7 (emphasis in original). Thus, the Employer averred that the number of its current Spanish speaking customers is irrelevant to its need to hire someone who can determine whether it should expand into the Spanish speaking market. AF 7. The second letter was written by the Alien and stated: "[a]s President of CIES, I continued to be employed in 1992 although I was not physically present in the Dominican Republic." AF 8. No other papers documenting the Spanish language requirement were included.

The CO denied labor certification in his Final Determination dated June 1, 1994. AF 3. The CO indicated that the Employer's rebuttal evidence was insufficient to document a business necessity for the Spanish language. AF 4. The CO explained his position as follows:

> While it is possible that the projected expansions may take place, in these uncertain economic times, there is no gurantee (sic) that the employer's business opportunities will expand into the South Florida Spanish speaking market. When the employer bases its needs on the plans of others, there is no immediate job opening available for either U.S. workers or aliens. The fact that the employer is requiring U.S. workers to possess language skills other than English, without providing evidence to support the need is not sufficient. . . ..
>
> The employer provided no evidence or records, such as feasability [sic] studies, that would require a person to be able to speak, read and write Spanish in this proposed expansion. Since the employer failed to provide any type documentation asked for in the Notice of Findings, the restrictive language requirement remains unsatisfied. This also leads the Certifying Officer to conclude that this job opportunity is a proposed projected expansion, for the sole purpose of obtaining labor certification for an alien, who has listed on the 750-B application that he is presently employed in the Dominican Republic; and has been since 1982, but residing in Gainesville, Florida.

AF 4.

On June 22, 1994, the Employer requested a review of the denial of certification. AF 1. A supporting brief and attached documentary evidence was submitted on behalf of Employer on August 8, 1994.

DISCUSSION

As stated above, in the Notice of Findings, the CO found that the Employer's Spanish language requirement is unduly restrictive. Accordingly, the CO required the Employer to indicate the nature of its business and show why the language requirement is essential to perform the job in a reasonable manner. Implicit in the CO's request for information and documentation is his assumption that the Employer's business serves the Spanish speaking market on an ongoing basis.

In rebuttal, the Employer attempted to clarify the CO's "misunderstanding" by indicating that the documentation he requested is not relevant in this instance as the job of Market Research Analyst is not meant to serve any of its current Spanish speaking clientele; its purpose is instead to determine whether or not it should expand its business into the Spanish speaking market. Therefore, the Employer did not include in its rebuttal any of the documentation requested by the CO in the N.O.F. Employer's rebuttal did, however, indicate that fluency in Spanish is essential for the position because:

> [i]n order to prepare and design the necessary questionnaires, surveys and opinion polls in Spanish for Spanish speaking persons to complete, obviously the employee must be able to speak, read and write in Spanish.

AF 7.

In his Final Determination, the CO did not discuss whether the Employer's reason for requiring Spanish language proficiency is adequate to meet its burden of showing that it is essential to the position of "Market Research Analyst." For instance, the CO did not analyze whether the job would require only that the Analyst design the questionnaires and surveys in English, leaving the translation into Spanish to a short-term contract worker. Furthermore, the CO stated only that the Employer failed "to submit sufficient documentation to evidence the Spanish language requirement," without discussing the reasons given by the Employer for failing to supply the documentation requested in the N.O.F. AF 4.

Instead, the CO discussed, for the first time, whether the Employer had shown that the Spanish language requirement was necessary for the Employer's "projected expansions." The CO apparently concluded from the Employer's rebuttal that it is attempting to expand its business into a new market and that the work in the proposed expansion would require the Alien to speak Spanish. Under these circumstances, an employer is required to show both that it has a definite expansion plan, and how the foreign language requirement arises from business necessity. *See Advanced Digital Corporation,* 90-INA-137 (May 21, 1991). The CO indicated in his Final Determination that the Employer did not meet this new, alternate test as it had not provided "evidence or records, such as feasability [sic] studies, that would require a person to be able to speak, read and write Spanish in this proposed expansion." AF 4. However, the CO had not asked for any feasibility studies in his N.O.F. In addition,

the CO indicated that the Employer did not provide any evidence showing that there would be a permanent, full-time job available to the Alien. Again, this information was not requested in the N.O.F.

We find that the CO erred in failing to adequately address both the Employer's rebuttal evidence and its explanation for its failure to provide the requested documentation, and in basing his Final Determination on evidence not first discussed in the N.O.F. These errors require that the case be remanded to the CO for further development of the record. *Reepu & Savitrie Singh,* 91-INA-110 (Aug. 3, 1992); *Dr. Mary Zumot,* 89-INA-35 (Nov. 4, 1991).

Accordingly, we vacate the denial of certification and remand the case to the CO for issuance of a new N.O.F. which clearly sets forth his proposed bases for denial of Employer's application.

ORDER

The final determination denying alien labor certification is VACATED, and the case REMANDED to the CO for further proceedings consistent with this decision.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/bg